June 16, 1932
10c a Copy

Volume 7, Number 10
$1 Per Year

THE LOS ANGELES BAR ASSOCIATION

BULLETIN

Official Publication of the Los Angeles Bar Association, Los Angeles, California

Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

Dinner Meeting
Los Angeles Bar Association

ALEXANDRIA HOTEL

THURSDAY, JUNE 23, 1932

Racketeers are not exempting the judiciary as objects of their attacks. It has long been the practice of certain organizations and individuals, by threat and subterfuge, to extort and wring money from candidates for judicial office in return for so-called support at the polls. *The situation is an alarming one to all law-abiding citizens and especially to members of the bar, who are so vitally concerned.*

HON. FRANK C. COLLIER

Judge of the Superior Court, will discuss this problem and others relating to the experiences of the judiciary under the present system of election of judges.

Relief in the form of a new plan designed to eliminate many of the evils so apparent in the present system, will be discussed by

HON. JOHN PERRY WOOD

former judge of the Superior Court and a lawyer eminently qualified to present this important subject to the bar.

FOLLOWING THE SPEAKERS THERE WILL BE AN

OPEN FORUM

for discussion from the floor by members of the Association.

—PROGRAM COMMITTEE.

PLEASE MAIL YOUR RESERVATION CARD PROMPTLY!

Dinner, $1.25 Informal 6:00 p.m.

Guests, Particularly the Ladies, Are Always Welcome.

Los Angeles Bar Association Bulletin

VOL. 7 JUNE 16, 1932 No. 10

Official Publication of the Los Angeles Bar Association. Published the third Thursday of each month. Entered as second class matter August 8, 1930, at the Postoffice at Los Angeles, Calif., under the Act of March 3, 1879.

BUSINESS OFFICE
241 EAST FOURTH STREET
TRinity 5206

Editorial Office
511 Citizens National Bank Bldg.
TRinity 0274

Scientific Methods of Approach

AS APPLIED TO STATE BAR ACTIVITIES

Science is defined as knowledge methodically classified and arranged. Without the methodical classification and arrangement of information facts cannot be ascertained.

Innumerable instances of the value of scientific research could be cited. In fact the citation thereof would be superfluous. Unless facts are first ascertained proceedings are haphazard and results are unsatisfactory.

As the basis for carrying on the section work of the State Bar a Research Department has been established. It is the purpose of this department to arrange and classify in a methodical manner all information available that has a bearing on the various State Bar Committee objectives. The work of this department should aid immeasurably the efforts of the committees.

The State Bar of California has taken a great forward step. One that should receive the hearty support and cooperation of all lawyers.

The section work of the State Bar is of particular interest to the Statewide Committee of Fifteen. It furnishes us with the material for informing the public that the Bar of California is functioning in the performance of its civic duties.

With the facts before them the practical men of the profession no doubt will be able to solve the various problems which confront us.

Every lawyer should realize that he or she is an integral part of the State Bar and individually responsible for its success and for the general reputation and welfare of the profession.

Constructive suggestions and criticisms will be helpful. Uncalled for and spiteful attacks on the State Bar, its Board of Governors and its various committees, are very harmful.

The opportunity for self-government offered by the State Bar Act should not be lost. Dissension within the ranks of the State Bar may endanger its very existence. Let us work for co-ordination and co-operation and take advantage of our opportunities to perform our full civic duty and establish the profession in its rightful position of leadership.

ARNOLD PRAEGER, *Chairman,*
Statewide Committee of Fifteen
of the State Bar.

Newton D. Baker Explains Operation of Plebiscite

ON JUDICIAL CANDIDATES AT CLEVELAND. PRESIDENT AMERICAN JUDICATURE SOCIETY WRITES MEMBER OF PLEBISCITE COMMITTEE. BELIEVES LOS ANGELES BAR ASSOCIATION HAS STARTED ON RIGHT COURSE

Mr. John Perry Wood,
458 South Spring Street,
Los Angeles, California.

My dear Mr. Wood:

As President of the American Judicature Society my attention has been called by our Director to the action of the Los Angeles Bar Association which proposes to submit judicial candidates to the judgment of the members of the Bar and to undertake to conduct campaigns for judicial positions in behalf of those approved by the Bar.

This procedure was instituted in Cleveland a number of years ago and our experience increasingly demonstrates its usefulness. Our Bar Association undertook this service to the community which it serves out of a belief that the profession owed a duty in the matter. The temperamental and character qualifications as well as the technical learning in the law necessary to qualify a man to be a judge are not qualities which laymen have the means of learning or weighing in candidates. As our City and its Bar grew in numbers we realized that men of high qualifications were lost sight of because of their unwillingness to resort to mere popular arts to advertise themselves, while men with meager qualifications spent their time in social activities and were favorably judged upon entirely irrelevant qualities. We discovered too that even when qualified men were nominated the embarrassment of seeking to make themselves known to the voters was great. The collection of campaign funds for candidates not only embarrassed the Bar and the public but subjected the candidates to suspicion in their relationship with particular members of the Bar who favored and promoted their candidacies. We therefore took over the whole subject and committed it to a Committee of the Bar Association headed by one of the ablest and best known members of the local Bar, the Committee itself having thirty members and being representative of both parties and of all the various branches of the law sufficiently specialized to be separately recognized. Each year for some years we have submitted the names of all candidates to the members of the Bar with biographical statements attached to the candidate's name, and on the basis of the Bar vote have selected a Bar ticket. We have required each candidate who sought the endorsement of the Bar to agree in advance that he would not persist in his candidacy if he was not chosen by the Bar vote and that if he was chosen he would conduct no personal campaign but rely entirely upon the Bar Association's campaign for the Bar ticket. After the Bar ticket has thus been chosen the Committee constitutes itself into a Campaign Committee, collects funds adequate to bring the Bar ticket to the attention of the voters by pamphlets, radio addresses, and other usual forms of political appeal.

Our newspapers have for the most part backed the Bar ticket although in some instances this backing has not been complete. The editors of our papers have felt that

they too owe a public duty in the matter and that in exceptional cases they were obliged to depart from the recommendations of the Bar Association as to a limited number of individual candidates. Nevertheless, the cooperation of the Cleveland papers has been in the main cordial and helpful and with each campaign conducted by the Bar Association in this manner there has been evidence of increased reliance by the public upon the integrity and wisdom of the recommendations made by the Association. The practice has now become a settled practice in Cleveland and those of us who have watched it most closely feel that we can now look forward to a time when the public will accept the recommendations of the Association as the best informed and most reliable advice the voter can receive upon his choice of technical and expert public servants. Nothing in the whole course of our experiment has been more reassuring than the frankness, discrimination, and courage of the members of the Bar as evidenced by their voting. The Bar has accepted the opportunity to vote in these matters as a serious professional duty, and the results of the voting have been in the highest degree creditable to the profession.

I, of course, know nothing about the conditions which the Los Angeles Bar Association is endeavoring to meet in the action it has now taken, but as President of the American Judicature Society I write to assure you that in my judgment you have started upon the right course, right not only in its likelihood of assuring high qualifications in your judicial elections but right also in the assumption of the professional obligation of informing the public on a subject about which the lawyers, in the very nature of things, are best qualified to know and to advise.

Sincerely yours,

NEWTON D. BAKER.

Arrest in Civil Actions

By Emmet H. Wilson, Judge of the Superior Court.

The Constitution of California provides as follows: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil action for torts, except in cases of wilful injury to person or property." (*Const.*, Art. I, Sec. 15.)

The Code of Civil Procedure provides that: "No person can be arrested in a civil action, except as provided in this code." (*C.C.P.* 478; *Ex parte Harker*, 49 Cal. 465.) Subsequent sections prescribe the cases in which arrests may be had and the method of obtaining the same. These provisions must be followed strictly in all particulars. An affidavit containing the matters required by section 481 must be filed as the basis of the order of arrest.

Jurisdiction Rests Upon the Affidavit

Jurisdiction to issue the warrant of arrest rests upon the affidavit. If the latter is insufficient the order of arrest is void. (*Ex parte Fkumoto*, 120 Cal. 316; *Fkumoto v. Marsh*, 130 Cal. 66, 80 Am. St. Rep. 73; *Neves v. Costa*, 5 Cal. App. 111; *In re Vinich*, 86 Cal. 70; *Lay v. Superior Court*, 11 Cal. App. 558; *Peterson v. Nesbitt*, 11 Cal. App. 370; *Ex parte Howitz*, 2 Cal. App. 752.)

The power of the court to issue the order of arrest is limited to facts appearing in the affidavit pursuant to which the order is made. Evidence, or another affidavit, offered at the hearing of the motion to vacate the order cannot act retroactively to confer jurisdiction upon the court to make the order, where power to make the same was wanting at the time of making it (*Lay v. Superior Court*, 11 Cal. App. 558.)

Allegations Must Be Certain and Positive

To authorize an order for arrest the averments must be certain and positive, and not ambiguous, argumentative, or in the alternative. An alternative allegation, such as that the money was received by defendant "as the agent *or* attorney in fact of plaintiff" is insufficient. (*Porter v. Hermann*, 8 Cal. 619.)

Allegations Must Be Within Affiant's Knowledge

An affidavit charging the acts substantially in the language of the statute is sufficiently specific if the allegations are upon affiant's own knowledge of the facts. (*In re Gillett*, 47 Cal, App. 107; *In re Caples*, 26 Cal. App. 786; *In re Keene*, 34 Cal. App. 263.)

But where the facts stated in the affidavit show that necessarily affiant is actually acting upon information and belief, rather than upon his personal knowledge, the evidentiary facts must be stated. (*In re Gillett*, 47 Cal. App. 107; *In re Keene*, 34 Cal. App. 263; *Neves v. Costa*, 5 Cal. App. 111.)

Allegations Cannot Be on Information and Belief.

An affidavit for arrest containing statements of fact upon information and belief, without stating the facts upon which such information and belief are founded, is fatally defective. (*Ex parte Fkumoto*, 120 Cal. 316; *Lay v. Superior Court*, 11 Cal. App. 558; *In re Vinich*, 86 Cal. 70.)

If the statement in the affidavit is upon information and belief, the facts upon which the information and belief are founded must be positive and clear, and must be such as would be competent and receivable as evidence upon the trial of an action, and such as would justify the court in making a finding of fact, upon a trial. (*In re Keene*, 34 Cal. App. 263; *Ex parte Fkumoto*, 120 Cal. 316; *Fkumoto v. Marsh*, 130 Cal. 66; *Neves v. Costa*, 5 Cal. App. 111.)

If the affidavit is made on information and belief, the *facts* upon which the information and belief are founded must be set forth, in order that the judge may find the existence of facts necessary to support the order. (*Neves v. Costa*, 5 Cal. App. 111; *Peterson v. Nesbitt*, 11 Cal. App. 370.)

But even though the allegations of fraud are on information and belief, if the source of the information is stated as the law requires, the affidavit will support the order of arrest. (*Ex parte Howitz*, 2 Cal. App. 752.)

The warrant cannot be issued on hearsay, (*Neves v. Costa*, 5 Cal. App. 111; *Lay v. Superior Court*, 11 Cal. App. 558; *In re Miller*, 60 Cal. App. 39), or upon statements of conclusions of law. (*In re Miller*, 60 Cal. App. 39; *In re Gillett*, 47 Cal. App. 107.)

Affidavit by Third Party

If a party seeking an order of arrest has not sufficient knowledge of his own to make the required showing, he may supplement his own affidavit with that of some one else who knows the facts. (*Neves v. Costa*, 5 Cal. App. 111.)

Reference in Affidavit to Complaint

The affidavit on which the arrest is made must disclose that a sufficient cause of action exists. The facts must appear by positive averments of the affidavit, and it is insufficient to refer to the complaint to show that which the affidavit itself should disclose, although it is positively stated in the affidavit that the complaint is true. (In this case the complaint was referred to in the affidavit, but was not attached thereto or copied therein.) (*McGilvery v. Morehead*, 2 Cal. 607.)

An affidavit is insufficient which states that a good and sufficient cause of action exists "as fully appears from the verified complaint," a copy of the complaint being set forth in the affidavit, but there being no statement in the affidavit that the facts stated in the complaint are true. (*Peterson v. Nesbitt*, 11 Cal. App. 370.)

But where the affidavit contains a copy of the complaint, with an averment that the allegations therein are true, it will be considered as if all of the allegations of the complaint were specifically set forth in the affidavit. (*Ex parte Howitz*, 2 Cal. App. 752.)

Facts Constituting Fraud Must Be Stated

An allegation of fraud in the affidavit, without stating the facts constituting the fraud, is insufficient. A specific intent of fraudulent purpose is the basic element upon which reposes the right of arrest given by statute. Such fraudulent intent may not be stated in general terms. Like a statement of a cause of action for fraud, the specific facts relied upon must be shown, in order that the court itself may deduce the fraud. A bare averment that the act was done fraudulently cannot be accepted as a statement of fact in support of an order of arrest. (*In re Vinich*, 86 Cal. 70; *Ex parte Fkumoto*, 120 Cal. 316; *In re Gillett*, 47 Cal. App. 107.)

Indebtedness Must Be Alleged

The affidavit for arrest must contain a positive averment that the indebtedness exists. Without such allegation the court has no jurisdiction to make the order of arrest. (*In re Vinich*, 86 Cal. 70.)

Intent to Depart from State

An affidavit upon which an order of arrest is asked may follow the statute and declare in positive terms that the defendant is about to depart from the state with intent to defraud creditors, or it may state the facts which will warrant the judge in concluding that such is the defendant's intent. (*In re Caples*, 26 Cal. App. 786.)

An averment on information and belief that defendant is about to depart from the state with intent to defraud creditors is insufficient. (*In re Vinich*, 86 Cal. 70.)

If the affidavit states that defendant is about to depart from the state with intent to defraud his creditors, it is not necessary to allege that he is about to remove any of his assets or property from the state. (*Ex parte Bernard*, 2 Cal. Unrep. 729.)

A statement in the affidavit that defendant "will escape from the state" and "thus defraud and cheat plaintiff," is the mere statement of a conclusion or belief, and not a statement of the facts from which such conclusion is drawn, or upon which the belief is founded. It is not evidence upon which the court is at liberty to act. (*Ex parte Fkumoto*, 120 Cal. 316.)

Insolvency Alone Not Sufficient

An allegation that a purchaser was insolvent at the time of the purchase is insufficient to support an order for arrest, without an averment that the defendant concealed or omitted to disclose his insolvency at the time the obligation was incurred, and then only when it is shown that the person whose arrest is sought cannot reasonably expect to pay the indebtedness, or that there is a fraudulent intent on his part not to pay. (*In re Miller*, 60 Cal. App. 39.)

Removal or Concealment of Property

An allegation on information and belief of removal and concealment of property is not sufficient. An allegation of a "pretended" sale is not an allegation of a sale, and does not prove that the party has sold his property with intent to defraud his creditors. (*In re Vinich*, 86 Cal. 70.)

An affidavit stating that defendant was packing his goods and that part of the goods, when packed, were removed to places unknown to plaintiff, is insufficient to show that defendant had removed, or was about to remove, his property with intent to defraud creditors. The removal or disposition contemplated is the taking or attempting to take the property without the reach of process of the court, — either the removal of the goods territorially without the court's jurisdiction, or the concealment of the same where they cannot be found. (*Ex parte Fkumoto*, 120 Cal. 316.)

Agency — Existence at Time of Conversion

If the defendant is charged under Sub. 2 of Section 479, the averment must be positively made that defendant was plaintiff's

agent and that the misappropriation or conversion of property occurred in the course of defendant's employment as agent of plaintiff. The fiduciary relationship must be alleged to have existed at the time of the misappropriation or conversion. (*In re Gillett,* 47 Cal. App. 107.)

Agency — Fraud Must Be Alleged

The fact alone that an agent had received money in his capacity as agent, which he had not paid to his principal, will not authorize his arrest. There must be an allegation of fraud on the part of the agent, or a demand upon him by the principal and his refusal to pay. (*In re Holdforth,* 1 Cal. 438.)

Complaint — Allegation of Fraud

In one case it was held that if the affidavit sufficiently showed fraud on the part of the defendant, it was not necessary to allege fraud in the complaint. (*Ex parte Howitz,* 2 Cal. App. 752.) But it has also been held that the facts upon which the charge of fraud is based must be specifically alleged in the complaint. (*Davis v. Robinson,* 10 Cal. 411; *Payne v. Elliot,* 54 Cal. 339.)

Finding of Fraud Necessary

To authorize an arrest on execution, the fraud must be stated in the judgment. The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found. (*Matoon v. Eder,* 6 Cal. 57; *Davis v. Robinson,* 10 Cal. 411.)

A judgment cannot exceed the relief warranted by the case stated in the complaint. Execution against the person upon a money judgment can issue only upon direction of the court to that effect, based on the special facts found, and such facts cannot be considered unless alleged in the complaint. (*Davis v. Robinson,* 10 Cal. 411; *Payne v. Elliot,* 54 Cal. 339.)

Fraud Must Be Connected With Subject of Action

If the fraud alleged in the complaint is disconnected from the subject of the action, and judgment is against the defendants on the allegations of fraud, the court is not authorized to adjudge the defendants guilty of fraud and to direct process to issue against them. (*Kullman v. Greenebaum,* 84 Cal. 98.)

Non-Resident Litigants

The right to arrest the defendant is a part of the remedy accorded a plaintiff in a civil action commenced in this state. Even though neither of the litigants is a citizen or a resident of California, and the cause of action arose and the fraudulent acts set up were committed in a foreign country, an order of arrest may be issued in an action brought in this state on such claim. (*Ex parte Howitz,* 2 Cal. App. 752.)

Partner — Liability of

Although, for many purposes, one partner is deemed the agent of the other partner, he is not an agent and is not acting in a fiduciary capacity within the meaning of the statute authorizing the arrest of a person for embezzlement or misapplication of funds by an agent or other person in a fiduciary capacity. (*Soule v. Hayward,* 1 Cal. 345.)

If a debt is fradulently contracted by a partnership firm through the act of one member alone, while all partners are responsible on the contract, liability for the fraud is limited to the partner committing the same. The partners who neither committed, ratified, nor acquiesced in the fraudulent act cannot be found guilty of the fraud. (*Stewart v. Levy,* 36 Cal. 159.)

Females — Liability to Arrest

Females are not exempt from arrest in civil actions commenced in the superior court, but are expressly exempted from arrest in civil actions in the justices' court. (*Burlingame v. Traeger,* 101 Cal. App. 365.)

Probate — Order of Distribution

An executor may be imprisoned for contempt of court for failure to comply with an order of distribution of an estate. A proceeding for settlement of an estate is not a civil action, and the amount required by the order of distribution to be paid by the executor to the distributees is not a debt. Therefore, such proceeding does not fall within the provision of the constitution inhibiting imprisonment for debt in a civil action. (*Ex parte Smith,* 53 Cal. 204.)

Civil and Criminal Actions — Priority

A person who is in custody of an officer under requistion from the governor of another state cannot be taken from such officer by another officer under a warrant of arrest in a civil action. (*Ex parte Rosenblat,* 51 Cal. 285.)

Bail — Liability of

The obligations of bail are assumed with reference to the law pursuant to which it is given. The law itself becomes a part of the contract, and the whole statute must be examined to determine the liability of the

bail. If the arrest is not supported by the facts, the bail is not liable. (*Matoon v. Eder,* 6 Cal. 57.)

Surrender of Defendant

The sureties on the bail bond of a defendant who has been arrested in a civil action are not bound to surrender him within ten days after judgment is rendered against him, unless plaintiff takes such measures as would authorize the sheriff to hold the defendant in custody. (*Allen v. Breslauer,* 8 Cal. 552.)

An offer by a defendant to surrender himself in discharge of his sureties discharges them from all liability, even though the sheriff refuses to take the defendant in custody. (*Babb v. Oakley,* 5 Cal. 93.)

Discharge of Defendant

If the affidavit on which the order of arrest is based is insufficient, or if process is issued in a case not allowed by law, the defendant will be discharged upon *habeas corpus; (In re Vinich,* 86 Cal. 70; *Soule v. Hayward,* 1 Cal. 345), or on *certiorari. (Lay v. Superior Court,* 11 Cal. App. 558.)

Failure to Pay for Support of Prisoner

The failure on the part of plaintiff to advance money to the jailer for the support of the prisoner, as required by Section 1154 C.C.P, does not, *per se,* operate to discharge the defendant. (*Ex parte Lamson,* 50 Cal. 306.)

May Arrest Once Only

When a party is once arrested and discharged, he cannot be arrested again in the same action. It will be presumed that the case has been fully stated in the first affidavit for arrest (*McGilvery v. Morehead,* 2 Cal. 607.)

Order Is Not Process

An order of arrest is not a "process" that must be issued in the name of the people of the state. (*Dusy v. Helm,* 59 Cal. 188.)

False Imprisonment — When Plaintiff Not Responsible

If the judge to whom application for an order of arrest is made has jurisdiction to pass upon the sufficiency of the evidence disclosed by the affidavit, the party applying for the order cannot be held responsible in an action for false imprisonment, unless these was an *entire lack of evidence* of some essential fact which the law requires to be shown. (*Dusy v. Helm,* 59 Cal. 188.)

In the case of *Fkumoto v. Marsh,* 130 Cal. 66, it is held that if there is an *"entire lack of evidence* of some essential fact required to be stated," the court does not have jurisdiction, and the action of the court in ordering the defendant's arrest will not protect the plaintiff against an action for false imprisonment. The case of *Dusy v. Helm* is distinguished, in that in the *Dusy* case there was *some* evidence and in the *Fkumoto* case there was *no* evidence.

Action on Undertaking — When Premature

Where, in an action in the justice's court, the plaintiff procures the arrest of the defendant, who is subsequently discharged upon trial of the action, the defendant cannot maintain an action on the undertaking while an appeal by plaintiff to the superior court is pending. (*Stechhan v. Roraback,* 67 Cal. 29.)

Irregularities Waived

Insufficiency of the affidavit cannot be set up by the defendant after final judgment. By putting in bail and neglecting to move to be discharged, he consents to process and waives all irregularities in this respect. (*Matoon v. Eder,* 6 Cal. 57.)

Fraudulent Transfer — Judgment of Arrest Void

In an action to set aside as fraudulent a transfer of choses in action, that portion of the judgment against the defendant (assignee) ordering his arrest was held void, as not being within the exceptions mentioned in Art. I, Sec. 15, of the Constitution, and not within the provisions of Sec. 479, C.C.P. (*Cooper v. Nolan,* 138 Cal. 248.)

JUDICIAL ETHICS

"Section four of the Canons of Judicial Ethics provides: 'A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach'."

Resolution of Board of Trustees

WHEREAS, it has been called to the attention of the Board of Trustees of the Los Angeles Bar Association that certain Superior Court Judges who are candidates to succeed themselves in the coming election, have received letters purporting to emanate from "The Personal Liberty League," which in tone and substance demand that the judges buy the "League's" endorsement of their candidacies by payment of a specified sum of money, and threaten opposition to their reelection in the event they fail to buy the "League's" endorsement; and

WHEREAS, it is essential to the preservation of an able and fearless judiciary, and to the maintenance in office of the highest type of judge, that said judicial officers be elected solely because of their qualifications as to legal training, experience, integrity, judicial temperament and independence of action, and it is the duty of good citizens to support candidates only because they possess such qualifications; and it appears from said letters that the endorsement of said "League" is a matter of barter and sale, not based upon the qualifications of the candidate and is therefore insincere, pernicious and reprehensible in the highest degree;

NOW, THEREFORE, BE IT RESOLVED, that the practice evidenced by said letters and all similar efforts to sell to any candidate for judicial office the endorsement of any organization, is vicious, subversive of the ideals of good government, deceptive to the voting public and is therefore to be vigorously condemned;

That the attention of candidates for the bench be called to the steps being taken by the Los Angeles Bar Association and the affiliated bar associations of the County, by means of a carefully conducted plebiscite to ascertain the judgment of the members of the bar as to the qualifications and fitness of the respective candidates, and to the plan of assisting the voters by conveying to them the information obtained in such plebiscite respecting such qualifications of the candidates; and further, to the fact that united support by the public and the candidates of the Bar Association's efforts in this regard, will afford protection against the sinister practices herein condemned.

Junior Bar Committee Activities

BIG MEETING ANNOUNCED

In an effort to surpass the great success of a similar affair held last year the Junior Bar Committee has arranged for a stag afternoon and evening at the Bel-Air Country Club on Friday, June 24.

The program, as arranged, includes a golf tournament and a tennis tournament, with suitable prizes for the winners. A dinner in the evening with plenty of fast entertainment but no speeches, will take up part of the time. From then on no set program is provided, but the members are free to amuse themselves as they see fit.

Because of the favorable impression created last year, a large turn-out is expected this time. Tickets may be obtained from any member of the Junior Bar Executive Council, for three dollars.

Extensive Speaking Campaign

Not all of the activities of the Junior Bar are confined to amusements. For the past month the junior lawyers have been engaged in visiting the junior high schools and high schools of the city, speaking to the students on the law as a profession. The purpose of these talks, given under the auspices of the Vocational Guidance Department of the Los Angeles Board of Education, was to acquaint the students with the problems confronting a young lawyer, the nature of an attorney's work, the educational requirements for admission, and the advisability of undertaking the practice of the law.

About fifty members of the Junior Committee visited twenty-three schools in the course of this work. The project was supervised by a committee composed of W. I. Gilbert, Jr., chairman, William Larrabee, Phil Davis, Kenneth Chantry and Robert Paradise.

The Committee has also been active in getting lawyers who have practiced less than three years to answer the economic questionnaire recently prepared by the State Bar. About eighty-six per cent of the members contacted replied. As a result the State Bar now has the data upon which to base an informative analysis of the financial rewards of the law to the younger lawyers.

Appellate Calendars and Trial Courts

CONGESTION, CAUSES AND REMEDIES DISCUSSED.

By Robert A. Morton, of the Los Angeles Bar.

Much has recently been said and written regarding the extended calendars of our appellate courts; certainly the emergency is with us and remedies must be applied, not only for the relief of the litigant with a grievance, but as well to lighten the excessive burdens that fall upon the personnel of the higher courts.

Numerous changes in appellate procedure have been confidently suggested. Unquestionably procedure can be speeded up to some extent; it may be that our District Courts of Appeal can be given additional Justices and enlarged jurisdiction with benefit; and appeals lightly taken may be cut off before their prime. However, I cannot believe that intermediate tribunals, or commissions to "settle the facts," can have any effect other than to complicate the situation and further delay the essential purpose and end of appellate litigation, namely substantial justice for worthy causes, and carefully considered and authoritative opinions that declare the law. Personally, I would prefer to suffer some calendar delay than to be called upon to battle to "settle the facts," for such contests must frequently develop into mutual struggles to settle the appeal. A Justice of our State Supreme Court, in immediate contact with the difficulties confronting his brethren, and of whom it may well be said that his learning and vigor of decision entitle his suggestions to respect, proposes certain changes in procedure above. Be that as it may, I feel that the principal active causes of appellate delay may be discovered in the functioning of trial courts, and that there also the problem must be attacked. Such are the factors which I desire to put to a frank discussion.

Oral Argument Versus Briefs

However, referring to appellate procedure, one matter appears to warrant a digression from the main thesis, and that is, the question of oral argument versus briefs. Oral argument should be compulsory prior to the submission of any cause in the appellate courts. The reasons for such rule are simple, and, I believe, unanswerable. An appellate opinion should represent the study and conclusions, not of one or two Justices, but of the entire court. Dissenting opinions frequently have high value in clarifying the law. To assure this desirable result, and for the information and aid of the court, the essentials of the appeal should be brought squarely before the entire court by competing counsel in the courtroom, thereby minimizing reliance upon the printed brief.

But additional virtues are in the rule, for it would tend to increase the labors of counsel in acquiring command of the subject matter. Also, the weaknesses that remain undetected or glossed over in print are known for what they are in discourse before the Bench; and would not such rule tend to discourage the prosecution of meritless appeals?

I am indebted to Mr. William J. Hunsaker for calling to my attention an eloquent statement of the reason for the rule, in the words of the Honorable John F. Dillon, former Chief Justice of the Supreme Court of the State of Iowa, taken from his "Laws and Jurisprudence of England and America." The author states:

> "They (the Justices of State Courts) begrude the time necessary for full argument at the bar. They dislike to hear counsel at length. They prefer to receive briefs. As a result, two practices have grown up too generally throughout the country, which have, as I think, done more to impair the value of judicial judgments and opinions than perhaps all other causes combined. The first is that the submission of causes upon printed briefs is favored, and oral arguments at the bar are discouraged, and the time allowed therefor is usually inadequate.
>
> "As a means of enabling the court to understand the exact case brought thither for its judgment; as a means of eliciting the very truth of the matter both of law and fact, there is no substitute for oral argument. None! I distrust the soundness of the decision of any court, of any novel or complex case, which has been submitted wholly upon briefs. Speaking, if I may be allowed, from my own experience, I always felt a reasonable assurance in my own judgment when I had patiently heard all that opposing counsel could say to aid me; and a very diminished faith in any judgment given in a

difficult cause not orally argued. Mistakes, errors, fallacies, and flaws elude us, in spite of ourselves, unless the case is pounded and hammered at the bar. This mischievous substitute of printer's ink for face-to-face argument impoverishes our case-law at its very source, since it tends to prevent the growth of able lawyers, who are developed only in the conflicts of the bar, and of great judges, who can become great only by the aid of the bar that surrounds them. What lawyer will prepare for a thorough argument at the bar when he knows that he will not have the time to present it? It was not thus until a recent period. Nor are these views at all novel. Lord Coke refers to the benefits of oral arguments in language the most solemn and impressive. In cases of difficulty, he says: 'No man alone with all his uttermost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision; nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right.' This, I declare unto you, I do verily believe.

"Formerly, whenever a new or difficult question arose, the judges of England invited argument and re-argument, always in open court; and in the earlier days of the law, the matter was not only debated at the bar by the counsel for the parties, but was afterwards discussed by the judges openly at a time prefixed in the presence of the barristers and apprentices; 'a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction to the studious hearers.' Truth is not apt to enter where she is not received with welcome and hospitality.

"If our case-law is not to go on deteriorating, we must revive the former appreciation of the value of oral arguments. It is these that must be favored, and it is the submission wholly on briefs that ought to be discouraged. . . . when opinions shall be rigidly restricted, without unnecessary disquisition and essay-writing, to the precise points needful to the decision, we shall have an abler bar, better judgments, and an improved jurisprudence, in which erroneous and conflicting decisions will be few, and reduced to the minimum."

In this connection, we can note the excellent record of our Appellate Department of the Superior Court, which dispenses with briefs, relies upon oral argument, and renders prompt and pointed decisions. Frequently the decisions are posted within one day following the argument.

Causes of Congestion

But to return to our major premise, I believe that the straws that bend the judicial backs in the appellate courts are the numerous causes that float and re-float up from below, which, had they originally received adequate attention in the trial courts, would there have terminated their judicial careers. I am convinced that appellate congestion is first of all brought about by what happens to cases too numerous to count in the trial courts, i.e., irresponsible rulings on motions for nonsuit, avoidable evidential errors, short-sighted decisions on demurrers, etc., etc., and to superficially considered findings, orders and judgments, for all of which judicial maiming the Bench and Bar must share the responsibility.

Trial court procedure, so recently liberalized, is generally satisfactory, although still capable of some improvement. We yet have with us the brand of demurrer aimed at time and trivial arguments rather than at the cause of action. We have unreasonable evidential restrictions, some of which harken back to the Dark Ages. And always we have the loser below, who remarks to the winner, "There's enough error in the record to sink you; we'll settle for one-half, or tie you up on appeal."

But aside from procedure and despite procedure, the larger responsibility for appellate delay rests upon the personnel of the trial judiciary. Where the judges are learned and strong, the mistakes of lawyers may stand harmless and corrected in time; and there can exist between Bench and Bar a spirit of mutual helpfulness and efficiency that must be at once reflected in a lessened strain upon the appellate courts. But where the Bench is weak, appellate business flourishes. I shall offer a few observations in this regard, as representing the possibly biased viewpoint of a lawyer whose practice in trial and appellate courts has been moderately active.

As To The Trial Judges

Trial judges who contribute to appellate congestion can be recognized by their works; and although it is now confidently asserted, and I believe correctly so, that a

new method proposed for judicial selection by an eminent authority in the May BULLETIN will eliminate such judges and provide the State with a superior judiciary, yet, in advance of an actual showing of that happy result, it may not be futile to consider the situation as it now stands.

We can all agree that the arrival on the Bench by the political route, or by reason of misdirected energy and ambition, of an immature and unprepared personality is a judicial tragedy. It is axiomatic that a prospective judge should have some sort of background of learning and experience in life and at the Bar. He should have read books other than the Codes; he should have practiced law as a lawyer rather than as an apprentice; he should have practiced to some extent before the Supreme Court; he should have carried responsibility; and he should have lived long enough to crystallize in himself mature viewpoints, character, and knowledge of human nature. Otherwise his reactions to fact and to law must be simple, weak, and pathetic.

What such a judge, thus unequipped, can do to a just and righteous cause before him (however sincere and faithful he may be) and to the record of the cause, should only be written in red. And if his courtroom must be a judicial shambles, unless for his own self-preservation he falls into the arms of eminent counsel on one side or the other, the result to his personal development must likewise be disastrous. For such judge, unless he is especially favored, or unless he can develop extraordinary latent abilities, will probably be relegated to the ranks, there to abide at a disadvantage among lawyers who have grown up and passed him on the way. It is not fair to the public, or to the Bench, or to the judge, or to the appellate courts; nor is it fair to the lawyer-to-be. Never should the Bench be regarded as a training school for unprepared lawyers. Some remedy should be devised and energetically applied to render that situation impossible.

Causes For Many Appeals

There is another type of judge, perhaps of some natural ability, who, once established, loses interest in his work, becomes sluggish, devotes much of his time to business or political affairs outside of his courtroom, and regards his judicial functions as a burden. Such judge is unwilling to study his cases, unwilling to assist in preparing a record, or to devote energy or ambition to the work for which he receives compensation, and may incline to favor friend-counsel. Necessarily the appellate courts are called to pass upon much of his output. Such judges, fortunately, are as few as they are conspicuous.

Then there is the judge who is bright rather than intelligent, who manages his courtroom as efficiently as a machine, but who issues snap decisions unsupported by reason or law, because he is unable to set reason in motion or to comprehend the law. This type of judge is dangerous from the appellate standpoint because he frequently leans to non-suits, a form of activity that ill becomes a non-judicial temperament. Again and again our Supreme Court has reiterated the sentiment that the remedy of non-suit should be used with extreme caution, for, when mistaken, it frequently amounts to a complete and permanent denial of justice to the injured party. But there is a type of individual who relishes a display of arbitrary power, for which the motion for non-suit gives opportunity, and many of his rulings must pass up for review and retrial. The judge discussed may be inclined to be highly technical on matters of evidence, despite modern tendencies in the opposite direction, and has been known to develop a habit of uniformly deciding close questions as to the admissibility of evidence against the party offering it. Needless to say, this type of judge turns plenty of business into the appellate calendars.

Much could be said about other judges, who, despite their best efforts, are temperamentally unfitted to serve the Bench, Bar, or the public; but the types above sketched are sufficient for my purpose, which is merely to connect up our appellate difficulties with the general question of selection and tenure of trial judges. Lest these remarks fall into the hands of an uninformed layman, let it be said that the judges above described are in distinct minority, and that most of the men who occupy the Bench in our County and State are capable and fitted for their responsibilities. It is the minority who fail to measure up to proper standards, whose handicaps weaken the judiciary as a whole, and who pile up the appellate burdens.

It is not to be pretended that the Bench should be made up of a standardized or assembly-line lot of Judges. The law is a vital, growing thing, and the aid of keen and varied personalities on the Bench is essential to progress. Judges whose background and legal philosophies may be as

widely dissimilar as that, for instance, of the members of the United States Supreme Court, enlighten and humanize the law. But there are very certain and definite judicial qualities, known to all of us and unnecessary to review, without which no man should be permitted to hold forth over the lives, liberties or property of his fellows.

Economic Waste Due to Appeals

It would be interesting and stimulating to know how much money and other property is now held suspended in mid-air awaiting disposition by appellate decisions; how many businesses are languishing, estates deteriorating, what personal energies are held in obeyance, and how many citizens are suffering financial or personal distress while the appellate calendars forbid early determinations. Such losses may be the cost of any litigation, but these are sadly intensified by years of waiting. The economic waste must be and is enormous; as is the additional cost of uncertainty where matters of importance to enterprises only indirectly concerned in current causes on appeal must also suffer delay.

It cannot be expected in the ever increasing complexity of life and the frictional relationships between law and the individual, that the need for rulings of the higher courts will diminish; on the contrary such need is certain to increase as the legislative machinery continues to function with great speed and optimism, and as the liberty of the citizen is further restricted by the activities of government under the increasing pressure of modern political and economic life. Such has been the history of all civilizations, past and present.

Public Reactions

It is as familiar as any platitude that the judiciary will command only that respect which it deserves. In the increasing inventions of quasi-judical bodies, as lay commissions and arbitration boards, all of which assume powers and duties formerly confined to the courts, will be seen the impatience of the people with what appears to be the lagging and reactionary tendencies in Bar and Bench. In an age of efficient and necessary specialization, where one medico knows the lungs, and another the heart, and another specializes in and about the cerebral regions, we of the law, in our large centers where many courts are available, still pretend to believe that all of the law and all of the administrative divisions of jurisprudence can be handled with equal effectiveness by all judges, and we refuse to believe in special courtrooms for special classes of causes. And yet it is as certain as the signs of the times that a rational, moderate specialization would eliminate not only much well-merited popular discontent with the law, but as well a huge volume of appellate business.

Probably at no distant time, all causes will enter the court house by the same door, but once within, each shall go its several way and be brought to hearing before a judge who has attained exceptional ability in the particular class of litigation. When that day arrives, the judge who is competent to delve into tangled corporate transactions will not be called upon to decide who was negligent at a street intersection, or to labor over the crude details of a contested divorce action. Then, the appeal, that unholy charge upon the patience and resources of litigants, will be chastened.

It was the Honorable Louis D. Brandeis who had this to say of the judiciary:

> "In the last century, our Democracy has deepened. Coincidentally, there has been a shifting of our longing from legal justice to social justice—What we need is not to displace the Courts but to make them efficient instruments of justice; not to displace the lawyer but to fit him for his official or judicial task—by broader education, by study undertaken preparatory to practice and continued by lawyer and judge throughout life; study of economics and sociology and politics, which embody the facts and present the problem of today."

"Judicial Fitness"

Is it too much to expect that sooner or later all judges will be chosen as a mark of esteem, as a recognition of ability in the profession, plus ownership of the qualities that we sum up as "Judicial Fitness"; that judges who, after a fair trial, fail or later deteriorate, will voluntarily or by request resign their places; that judgeships will never be deemed as sinecures, but rather as places of public trust wherein the occupants must give value or give way? The trend must be in such direction, otherwise our modern legal fraternity shall have failed in its mission.

A College of Judges—Judicial Selection

By Samuel Ross Enfield of the Los Angeles Bar

We must consider, to adapt the words of Sir William Blackstone, "the old law, the mischief, and the remedy."

"THE OLD LAW" provides for judicial selection by election, that is, self-nomination and political campaigns, with all its attendant evils, pitfalls, promises, primaries, political alliances, expenditures, general elections. It is a form of democracy triumphant; theoretically truly beautiful, but practically, a dud. The makers of the United States Constitution foresaw this and made the judiciary appointive.

"THE MISCHIEF" OF THE SYSTEM consists in bringing the judiciary into disrepute. As has been truly said, and many times repeated, "it is not enough for a judge to be honest, learned and capable"; he must be, like Caesar's wife, above suspicion. The election of a judge contemplates all the maneuvers, deals and strategy of a political campaign. That signifies combinations, machinations, money, pledges, obligations, not to use the ugly word, corruption.

The candidate for judge must make his plans, map a campaign, lay his lines of contact, just as any other candidate for office. He is exempt from nothing. He must undergo the crucifixion of the campaign for his salvation.

THE NEOPHYTE ASPIRANT FOR JUDICIAL HONORS must go to the bosses and must deal with the harpies of political racketeers. In a recent campaign a candidate for judge found himself in the toils of politics and politicians. The campaign culminated in the candidate killing two of his political antagonists. Is it thru such vicarious methods that we are to elect our judges? The extreme instance cited is but an illustration of the trials and vicissitudes of judicial campaigning.

The candidate is beset by challenges for money, gentlemen's agreements, threats, demands to combine, to withdraw, to play the game, AND BY CONTRIBUTIONS TO CAMPAIGN FUNDS FROM SECRET SOURCES. Men of character, learning, administrative ability, known integrity, will not submit to such campaigns. That men minus these indispensable qualities do campaign and are elected is an accepted fact. The avoidance of electing some men unfitted for the judiciary is impossible.

IN A FREE FOR ALL CAMPAIGN, THE BEST CAMPAIGNER, AND NOT THE BEST QUALIFIED, WILL WIN. Common experience proves it.

THE CANDIDATE ON THE BENCH, mark the words, feels a dagger thrust in his bosom at every adverse ruling, order or appointment. There are judges who perform their duty without fear or favor—but their seats tremble beneath them—and candidacies so based meet with little encouragement. The saddest spectacle viewed by public eye is that of an electioneering judge. I dare not use the adjectives that such a spectacle suggests. I dare not. Campaigning in and out of court, appointing gift-giving fiduciaries supposed to be politically powerful, watching their step in ruling upon admission of testimony offered, or objected to, by politically active attorneys, cautious in taking under advisement issues affecting great corporate interests with large voting personnel, trimming in passing on motions for postponements, continuances, new trials, etc., etc. Politics, elections, the necessity for votes, make them so.

Witness the tragedy of the elected judges of New York. Even before the Judge Seabury investigation into sale of judgeships, judges were forced to resign, were removed or absconded. I will not comment upon the apocalypse of the courts in Los Angeles. For after all the whole court, and the bar, is responsible for the few. Are we not our brother's keeper? In practice the elective system for judiciary has broken down. In populous counties, of 100,000 or more, that is true absolutely and in such counties, in any event and as a beginning, should be changed.

The election of fifty Superior Court judges in Los Angeles County and thirty Municipal Court judges in Los Angeles City, has shown and proven the impracticability of the exercise of such franchise. For the people to know the qualifications, or to be informed, of the almost innumerable candidates who offer at each election, judicial, administrative, political, is utterly, definitely impossible.

The shores of judicial aspiration are strewn with wrecks of candidacies on and off the Bench that would not bend or break to the presence of political powers in the shadows.

"The mischief" of electing judges is unmistakable. The palliative, the "helps" of Bar Association plebiscite and tocsin call to the people, is but an attempted amelioration, is but an expedient, and not a remedy. The Bench is at bay with the dogs of politics and must be defended or be devoured.

The present system of elective judiciary is falling—it might be buttressed by this or that repair or support but nevertheless it must fall—for its faults are inherent and cannot be eradicated.

"The Remedy" Must Be Found and Applied

It should be mentioned that the judges of the Supreme Court of the United States are appointed with advice and approval of Senate, that judges in England and France, and for that matter all over the world, are appointive and in five states of the Union, Delaware, Maine, Massachusetts, New Hampshire and New Jersey, are appointed by the Governor with consent of Senate. In Florida the principal trial court judges are appointive by Governor under approval of Senate. In four states they are elected by the legislature. This shows a strong variance from elective system.

California practices an elective judiciary for full terms and appointive by Governor for vacancies, without any safeguards of confirmation or qualification, as shown by Constitution, Article VI, sec. 3, for judges of the Supreme Court, by sec. 4a, for justices of District Court of Appeal, by sec. 6, for Superior Court judges, by sec. 11, for Municipal Court judges, the last somewhat qualified by provision in paragraph three of said section 11, that "The manner in which, the time at which, the term for which the judges, clerks and other attaches of Municipal Courts shall be elected or appointed shall be prescribed by the legislature." This last provision indicates a tendency towards constitutional power for appointment of Municipal Court judges. The consistent provision for appointment to vacancies by Governor shows the policy of resting power in gubernatorial appointment next after elective method.

CHARACTER, LEARNING, TEMPERAMENT, LEGAL EXPERIENCE, JUDICIAL TRAINING, SHOULD BE BASIC QUALIFICATIONS FOR SELECTION TO THE JUDICIARY. Each quality mentioned must be present. The last, judicial training, has been largely disregarded in past. It is an indispensable factor in judicial administration.

Men are educated for the bar, an engineer is educated for his work, a minister to his holy service, a doctor to his ministration of curing the sick and healing the wounded, poets are born—BUT A JUDGE IS MADE BY THROW OF POLITICAL DICE.

Judicial training is a *sine qua non* to an embryo judge. He should be, he must be, prepared and qualified for the highest duty of man to man,—to judge. Do we trust our limbs, our lives, to a surgeon of chance? Do we place our engineering problems in the hands of a ditch digger? No, we require preparation and graduation of each.

Judges should be trained, prepared, educated, for a responsibility second only to that of Him who judges all.

JUDICIAL TRAINING SHOULD BE AN ESTABLISHED PREREQUISITE TO JUDICIAL PREFERMENT.

I propose a college of judges within the University of California. A college of judges with proper curriculum, in the manner of post graduate courses, would fit a practicing attorney for judicial office. In time such a college would develop and mark the men of judicial qualities.

I advocate judicial training for judicial office and appointment of qualified persons by Governor, controlled by certification as to qualifications. A system of training, qualification and certification through the University of California is fully set out in constitutional proposals submitted. I also submit a plan of appointment by Governor subject to certification by Board of Governors of State Bar and a plan substituting the judicial council for Board of Governors.

We live under a government of checks and balances. The president of the United States, the Congress and the United States Supreme Court are checks upon one another. The same principle applies in the states. To grant an unchecked, unrestricted power of appointment to the Governor might permit the invasion of politics; the checks and balances of proposed restrictions would prevent a free reign as to appointees and would protect the people against a political minded Governor. These proposals would afford training, education, qualification for judicial office. Merit would then determine judicial selection—not sycophancy to political bosses plying their power for profit.

PROPOSAL I.— THE COLLEGE OF JUDGES

Amend Article VI of Constitution by repealing section 3 and substituting a new section 3 therefor, as follows:

Sec. 3. The chief justice and the associate justices, the justices of all district courts of appeal, the judges of the superior courts and the judges of the municipal courts shall serve during good behavior, and shall be appointed by the Governor, subject to provisions hereof. Upon expiration of existing terms of said justices and judges, and to all vacancies arising, appointments shall be made by the Governor subject to certification herein required, and no appointment to said judicial offices shall be valid and lawful unless appointee has been previously so certified, provided that the Governor may appoint any justice or judge of said courts to any other judicial office without certification.

Sec. 3-a.

(a). The University of California shall establish and maintain a department to be known as a College of Judges for the registration, education, qualification and certification of registrants for judicial office.

(b). Any member of the State Bar may register with said College of Judges, declaring intention to prepare and qualify for appointment to judicial office. Registrants shall observe and comply with rules, regulations and requirements appertaining to qualification for the judiciary.

(c). Said College of Judges shall have a dean and faculty, designated by the President of said University, and the dean shall institute, subject to approval of Board of Regents of University, the course of instruction to be pursued by registrants to best qualify them, and a plan to best determine their fitness, for judicial office. Such course shall include the study of cannons of judicial ethics; the constitution of the United States and the state; the administration of equity and law; judicial conduct in respect to public and bar; duty in re-appointments of fiduciaries and allowances of all fees; the preparation of instructions to juries; the obligations of the judiciary to society in the correction of crime, securing justice and progressively applying the principles of law to new conditions.

Such plan shall include ascertainment of registrants' personal history and education; the observation of character, ability, learning and temperament; data as to practice and checking same as to capacity and conduct. Registrants shall be examined touching required studies, and shall be given credits and be rated in respect to all requirements to determine qualifications and fitness for judicial office.

(d). A roster of registrants shall be kept and registrants certified to the Governor, under signature of President of University, in following manner,—for each expiration or vacancy in judicial office the names of five registrants, resident as required by law, having highest qualifications under rules, with record, credits and rating of each, provided that all registrants of similar qualifications shall be certified.

Sec. 3-b. All provisions of constitution and laws in conflict herewith are hereby repealed.

PROPOSAL II.
BOARD OF GOVERNORS OF STATE BAR

Article VI. sec. 3: The chief justice and associate justices, the justices of all district courts of appeal, the judges of the superior courts and the judges of the municipal courts shall serve during good behavior, and shall be appointed by the Governor, subject to provisions hereof. Upon expiration of existing terms of said justices and judges, and to all vacancies arising, appointments shall be made by the Governor subject to certification herein required, and no appointment to said judicial offices shall be valid and lawful unless appointee has been previously so certified, provided that the Governor may appoint any justice or judge of said courts to any other judicial office without certification.

Sec. 3-a:

(a). There is hereby created a public corporation to be known as "The State Bar of California" which shall have perpetual succession with powers and duties, and be constituted, as now or hereafter provided by law. The Board of Governors of the State Bar, constituted by State Bar Act of 1927, and as same may be amended, shall constitute and be a Judicial Board to determine and certify qualifications of registrants for judicial office.

(b). Any member of the State Bar may register with said Judicial Board declaring intention to prepare and qualify for appointment to judicial office and undertaking to comply with rules, regulations and requirements of Judicial Board.

(c). The Judicial Board shall establish rules, regulations and requirements touching preparation for and attendance at examinations of registrants and the information and data to be submitted as to personal history, education, experience, law practice, temperament, administrative capacity, all of which

shall appertain to qualification for the judiciary, and shall establish a course of instruction to be pursued by registrants, planned to best qualify and fit them for the judiciary.

(d). A roster of registrants shall be kept and registrants certified to the Governor, under signature of President of State Bar in following manner,—for each expiration or vacancy in judicial office the names of five registrants, resident as required by law, having highest qualifications under rules, with record, credits and rating of each, provided that all registrants of similar qualification shall be certified.

Sec. 3-b: All provisions of constitution and laws in conflict herewith are hereby repealed.

PROPOSAL III.
JUDICIAL COUNCIL

Substitute judicial council as a judicial board for "Board of Governors" in Proposal II, and substituting Chief Justice for President of State Bar in section 3-a (d).

I favor the "College of Judges" plan as it provides for training and qualification under faculty of University and contemplates a course of study fitting the lawyer for impartial judicial service, whereas practice at the bar only, develops forensic partisanship, and narrows the field of experience and learning.

It should be noted that the Constitution, Article IX,, sec. 9, establishes the University and that the Political Code, sections 1385-1477 inclusive, regulates it, and that section 1386 thereof now provides: "There must be maintained" certain colleges, including one of law. And furthermore by section 1479, Political Code, Hastings College of Law is declared to be the law department of University, and by section 1485,

> "The business of the college is to afford facilities for the acqusition of legal learning in all branches of the law, and to this end it must establish a curriculum of studies and must matriculate students who may reside at the university of the state, as well as students residing in other parts thereof."

The Board of Governors' proposal is subject to the disturbing fact that the State Bar Act provides, sec. 2, last paragraph—

> "The term of existence and the powers of said corporation (State Bar) may be changed or terminated at any time by an act of the legislature of the State of California."

Under said provision the life of Board of Governors might be extinguished at any session of legislature and would thus destroy proposal II. This situation could be remedied by constitutional amendment perpetuating State Bar, as provided for in proposal. And it should be done.

And it should be noted that under State Bar Act section 9, there is a member of Board of Governors in each congressional district, and therefore local contact and information would be always available.

The Judicial Council proposal is seriously affected by state constitution, Article VI, sec. 1-a, providing that

> "It (Judicial Council) shall consist of the chief justice or acting chief justice, and of one associate justice of the supreme court, three justices of district courts of appeal, four judges of superior courts, one judge of a police or municipal court, and one judge of an inferior court, assigned by the chief justice."

The fact that every member of Judicial Council is assigned by Chief Justice might not work well in respect to the subject matter. It would be charged that it was a one man board and might involve the Chief Justice in criticism. I have presented this proposal because many members of the bar have the Judicial Council in mind, for such duty.

Existing provisions for impeachment, removal and recall must be retained.

As the matter of suspension is now very much before the bar, and as the constitution does not meet modern demands, have prepared and submit the following provisions for consideration:

Amend Article VI, sec. 10, constitution by adding:

> Superior and municipal court judges may be suspended by chief justice upon full report and recommendation of suspension by grand jury of county of incumbent. After public hearing the chief justice may reinstate the judge or refer suspension to both houses of the legislature. Order of suspension and of reference shall be entered on minutes of court. Should legislature fail to act, being in session, within thirty days, said suspension shall cease.

Said section 10 now deals with removal of judges, and with addition of proposal would cover suspension now lacking.

These proposals are submitted to consideration of State Bar and Los Angeles Bar and their committees for improvement, laceration and vivisection, and to the better judgment of my fellow members of the Bar.

Late Interesting Cases on Automobile Negligence

TURNING IN "SAFETY." SUIT IN CALIFORNIA ON ACCIDENT IN OKLAHOMA. LEXI LOCI. LEX FORI. LAWS OF SISTER STATE. GUARDIAN AD LITEM FOR MINOR DEFENDANT. EVIDENCE OF LIABILITY INSURANCE. REQUEST FOR INSTRUCTIONS

By Mark A. Hall, of the Los Angeles Bar.

Turning in "Safety"

In *Inouye v. Gilboy*, 65 C. A. D. 1119, plaintiff was making a left turn off the highway, into a private driveway; and defendant coming up behind, ran into plaintiff's car. Defendant claimed plaintiff was guilty of contributory negligence as a matter of law, by violating Section 130 of the California Vehicle Act which provides that before turning, the driver "shall see first that such turning movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety." But the Court says:

"'Safety' does not mean absolute safety, for under that construction a driver intending to turn would be required to await the time when no other vehicle could possibly be affected in any way by such movement. The quoted portion of the section should be construed to require that the driver see first that the movement could be made in safety, assuming that both he and others using the highway exercise ordinary care. This gives to the common-sense rule embraced in the section a common-sense interpretation. Any other interpretation would make it impossible, where traffic is heavy, to make a turn in compliance with the law, without an interminable wait."

Suit in California on Accident in Oklahoma

Several interesting questions are raised in *Loranger v. Nadeau*, 66 C. A. D. 167. Defendant, a citizen of California, was driving from Montreal to his California home; plaintiff was his guest. In Oklahoma a collision occurred with another car; plaintiff was injured, and sued the defendant in the California courts. The complaint pleaded negligence in general terms, without any allegation of "gross negligence," and without pleading the laws of Oklahoma. Defendant demurred on the grounds, first, that the complaint, minus any allegation of gross negligence, did not state a cause of action under section 141¾ of the California Vehicle Act (requiring a guest to show gross negligence on the part of his host before the guest can recover), and second, that as the accident happened in Oklahoma, the action should have been brought there, and that the California courts had no jurisdiction.

The District Court of Appeal held:

Torts Determined by Lex Loci

1. That the complaint did state a cause of action, even though gross negligence was not pleaded, because it showed that the accident happened in Oklahoma, and that "the substantive law defining one's rights with reference to torts is to be found in the laws of the State where the alleged tort occurs."

Tort is a Transitory Action

2. That the California courts had jurisdiction, because "a tort is a transitory action and under certain circumstances may be tried in any court which obtains jurisdiction of the parties."

Judicial Notice of Laws of Sister State

3. That it was not necessary for plaintiff to plead the laws of Oklahoma, for the reason that the California courts will take judicial notice of "the laws of the several sister states of the United States and the interpretation thereof by the high courts of appellate jurisdiction in such states"; citing Sec. 1875 C. C. P., which was amended in 1927 to warrant such judicial notice.

Lex Fori Prevails over Lex Loci

4. The Court points out that the *lex loci* of the accident (Oklahoma), and the *lex fori* of the action (California), are different, because of the provisions of section 141¾ of the Vehicle Act; that under said Act, it is contrary to public policy in California to permit a guest to sue his host for ordinary negligence; that where the *lex loci* is contrary to the moral standards of the *lex fori*, the *lex fori* will prevail; and that in such a case as the one at bar, if a California defendant, by virtue of the laws of a sister state where the accident happened,

could be sued in California on a cause of action which could not be maintained if the accident had happened in California, he would be placed in a more disadvantageous position than if the accident had happened here. The Court therefor held that the defendant's demurrer should have been sustained.

(AUTHOR'S NOTE: This writer may be wrong in interpreting the Court's opinion, but there seems to be an inconsistency between the holdings in paragraphs 1 and 4 above. It will be interesting to observe whether this case is carried to our Supreme Court, and if so, what the holding of that Court will be.)

Failure to Appoint Guardian Ad Litem for Minor Defendant

In *King v. Wilson,* 66 C. A. D. 641, the defendant was a minor 20 years old; no guardian *ad litem* was appointed for him; he had a competent attorney, and his case was well tried. Upon judgment being rendered against him, he sought to have it set aside upon the ground that no guardian *ad litem* had been appointed for him.

The Court held that the failure to appoint a guardian *ad litem* was not a jurisdictional defect, but a mere irregularity; further pointed out that a mere irregularity is not sufficient to warrant the granting of a new trial, unless it prevented the party from having a fair trial; and held that as the minor in this case had been ably represented, both on the original trial and on the appeal, and as no showing had been made as to wherein he had not had a fair trial, the judgment against him must be affirmed.

Deception of Court

The Court remarks:

"The defendant Wilson, being past 20 years of age, came into court by the filing of his answer to the complaint, announced ready, and proceeded to trial with an attorney; sat all through the trial with the knowledge of his nonage; did not disclose this fact to the court nor to his attorney; and then when judgment was rendered against him, for the first time advised the court on his motion for a new trial that he was a minor. In other words, had the jury found in his favor nothing would have been said as to his age, but since it found against him he now seeks to get out from under the judgment by reason thereof. Such actions are most reprehensible, to say the least. He was willing, by his silence, to deceive the court. Such actions should not be countenanced."

When Evidence as to Liability Insurance Is Admissible

During plaintiff's direct examination, her attorney elicited evidence as to a conversation she had had with defendant, in which the latter said "he was sorry it all happened but he had insurance to pay for everything."

The Court, in discussing the oft-raised question as to whether evidence of defendant's liability insurance is admissible, states that it is, in three cases:

1. When the testimony disclosing insurance is inextricably coupled with an acknowledgment of liability.

2. Where it appears that no verdict could have been rendered for the defendant anyway, the admission of testimony regarding insurance is not alone sufficient to necessitate a reversal.

3. Where it is necessary for plaintiff to prove that the defendant owned the offending car, evidence may be admitted that he took out liability insurance thereon, or that he made a report to the insurance company wherein he admitted ownership of the car.

The instances mentioned in paragraphs 2 and 3 above are probably *obiter,* so far as the present case is concerned. But that mentioned in paragraph 1 is not, for the court specifically held that the last four words of defendant's statement, "to pay for everything," constituted an acknowledgment of liability.

See also, *Cleveland v. Petrusich,* 67 C. A. D. 34, at 40.

Record Must Show at Whose Request Instruction is Given

In *Cleveland v. Petrusich, supra,* an instruction had been given (at whose request, it did not appear) which appellant claimed was erroneous. The court said:

"The appellant is not in a position to complain. * * * When the giving of an instruction is assigned as error, the record must show at whose request the instruction was given or that it was given by the court of its own motion. * * * The record does not show at whose request the instructions were given, and the presumption, therefore, is that they were given at the appellant's request."

Moreover, "Where there is a failure to give an instruction, and the record does not show a request therefor, it will be presumed that no request was made."

Practical Applications of Declaratory Relief Under English Practice

APPARENT UNWILLINGNESS OF BENCH AND BAR OF U. S. TO RECOGNIZE ITS UTILITY

By Wm. G. Randall, of the Los Angeles Bar

The United States of America and the several states thereof are sovereign and independent commonwealths, which nobody can deny; but that is not sufficient reason for being slow in borrowing and utilizing a good idea from the neighbors. Beginning with the year 1919, some twenty states, including California, have now vested their courts with power to render Declaratory Judgments, either with or without consequential relief. Yet the gingerly fashion in which both Bench and Bar have handled the new weapon in the legal arsenal seems to indicate an ultra-conservative unwillingness to recognize its utility in the administration of justice. (We think that "new tool in the legal tool chest" would be a more appropriate metaphor, since the basic purpose of Declaratory Relief provisions is to enlarge the possibilities for the settlement of issuable questions without a fight.)

The principle of Declaratory Relief was introduced into English jurisprudence by the Chancery Reform Act of 1852. It was there derived directly from Scotland, where it has been in successful use for several hundred years under the name of the "Action of Declarator," and remotely, from the Roman law. Most of the Continental jurisdictions also have substantially similar provisions.[1]

In the first instance the new procedure received a narrow construction, the English courts holding, in obvious deference to the traditional view of the judicial function, that a plaintiff could not apply for Declaratory Relief except upon a statement of a cause of action upon which he *might* have prayed consequential relief as well; though when such a cause of action was shown the plaintiff was permitted to waive a consequential judgment and pray for a declaration alone. It is a rather pointed illustration of the possibilities of expansion, even in the judicial mind, that when the English courts were vested with the rule making power one of their early acts was the adoption, in the year 1883, of a Standing Order by which they themselves did away with the limitations which they had previously placed on the scope of Declaratory Relief. The rule referred to is as follows;

> "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the court may make binding declarations of right whether any consequential relief is, or could be, claimed or not."[2]

The beneficial applications of Declaratory Relief were further enlarged in 1893 by an additional Order, as follows;

> "In any division of the High Court, any person claiming to be interested under a deed, will or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."[3]

The citation of English authorities in proceedings under American statutes always calls for extreme caution. England has no written constitution. Parliament is the supreme legislative authority, restricted only by its own traditions. Hence the English courts are never called upon to face the question of the "constitutionality" of an Act of Parliament, in the sense in which that term is used in American jurisprudence. Nevertheless it is profitable, for the purposes of this article, to note the practical uses which the eminent jurists over the water have found for Declaratory Relief under their system.

Beneficial Uses

In an extensive monograph on the subject published in 1920,[4] Professor Sunderland calls attention to the wide application and beneficial uses of Declaratory Relief in England. He observes that out of 64 cases

1. For a general discussion of the history of Declaratory Relief, see "The Declaratory Judgment; A Needed Procedural Reform"; Edwin M. Borchard, in 28 Yale Law Journal, 1 et seq.
2. Order XXV, Rule 5.
3. Order LIV, a.
4. "The Courts as Authorized Legal Advisors of the People"; Edson R. Sunderland, in 54 American Law Review, 161 et seq.

in the current reports of the Chancery Division, (1916), 43 were Declaratory Relief causes; and he points out many interesting decisions. Space limitations forbid a re-examination of the cases noted by Professor Sunderland; but lawyers interested in the subject will find their time well repaid in a careful study of the article cited.

It is quite apparent from the latest reports that in the period from 1916 to 1930 Declaratory Relief had not lost its popularity under English practice. Chancery Reports for 1930, volumes 1 and 2, comprise 91 cases of which 51 were declaratory proceedings.

Merits of System

It is worthy of note that from the inception of the American practice in Declaratory Relief, leaders in the field of legal education have been among its most enthusiastic proponents. In an article published about the time that the National Conference of Commissioners on Uniform State Laws, in 1921, submitted the Uniform Declaratory Judgments Act to the consideration of the profession, Professor Borchard thus sums up his views of the merits of the system and the benefits to be derived from its general application.

"Its intrinsic merits in effecting the removal of clouds from legal relations, in simplifying the adjudication of contested issues, and in preventing rather than merely curing legal injury and the accrual of damages, have served to gain for it the almost spontaneous approval of Bar Associations and legislative committees. * * * Its appeal to the American Bar has been based largely upon the fact that other countries having relatively the same industrial, economic and social development as our own have found the declaratory judgment increasingly useful as an instrument of preventive and remedial justice. Wherever the procedure has been adopted, it has constantly grown in favor and utility. * * *"

Making reasonable allowance for the stubborn fact that reforms in social practice never work quite as well and effectively as their proponents think they are going to, we believe it can be demonstrated that the declaratory judgment in America has proved itself "increasingly useful as an instrument of preventive and remedial justice," and that it has "grown in favor and utility."

PASADENA BAR ASSOCIATION MEETING

The June meeting of the Pasadena Bar Association was held Thursday evening, June 9, at the Arcade Tea Room.

The principal feature of the evening was open discussion on the general topic:

> "What is the responsibility of the general public in connection with the present unsatisfactory condition which prevails in the administration of justice."

The four sub-topics assigned were:

1. The general public's connection with the principal topic with regard to Legislation—Kenneth C. Newell.

2. The accomplishments and shortcomings of the public on the witness stand—Elliot Gibbs.

3. The accomplishments and shortcomings of the public as jurors—Vernon Brydolf.

4. The attitude of the public as litigants—E. DeYoung Vasse.

Following the four speakers named, the topic was thrown open to general discussion, and a number of the members were heard.

The committee on a proposed new Constitution and By-Laws presented a report of its work.

President H. G. Simpson presided.

Judicial Selection and Tenure

AMERICAN JUDICATURE SOCIETY TO COOPERATE IN IMPORTANT NATION-WIDE STUDY

(Herbert Harley, in the American Bar Association Journal for June, 1932)

A nation-wide study of the entire problem of judicial selection, tenure, removal and salaries is to be made by a committee of lawyers, judges, political science experts and laymen under the joint auspices of the National Municipal League and the American Judicature Society. The committee is headed by Dean Justin Miller, of Duke University School of Law, and Mr. Edward M. Martin is in charge of the investigations. The successful organization of the committee was announced by Dean Miller at the annual meeting of the American Judicature Society, held in Washington on May 4th.

The Hon. Newton D. Baker, president of the Society, referred in his opening remarks to the larger projects within the field of judicial administration with which the Society has been concerned. "We are now trying to perform the services our Country has a right to expect from its Bar." The first matter mentioned was that of unifying the courts of each state in respect to administration and administrative authority. "I happened to be in London some years ago," he said, "and visited a court where Mr. Justice Darling, one of the most distinguished judges of the High Court of England and Wales, was trying the case of a boy who was accused of having stolen a baby carriage and a second-hand lamp, the value being not more than a pound or two. I think I never had a more vivid impression. There was a nation which did not regard the petty concerns of insignificant people as of no importance. One of the greatest judges of England was taking his turn trying the cases of a lower court. It seems to me that if we could unify our courts so that there would be no case beneath the attention of the ablest judges, that would improve the type of men sitting on the bench. With us justice in its least aspects should be an important public concern. The best minds and the best consciences are needed for the cases of the poorest of our citizens as well as for the larger cases. If we achieved this ideal we would go a great way toward self-discipline, which is the most important principle in a republic. The Judicature Society has always had as one of its dreams the achievement of this ideal."

President Baker then spoke of the Society's support of the idea of judicial councils as a first step toward judicial unification, and said he believed that such councils should have lay members, which situation "would raise the curtain on the proceedings of the courts and the discussions of the judicial council to those not normally on the inside, and would increase understanding outside the profession of law of the processes of justice." He thought that the press should be represented, the League of Women Voters, and labor organizations. "Their admission would be the admission of an indispensable element—the element of public opinion, on matters of vital importance to great groups of people."

Turning to judicial selection, President Baker explained the work of the Cleveland Bar Association in securing bar opinion as to the best qualified candidates, and in pledging to them bar support on condition that they neither raise, nor permit to be raised, funds for campaign expenses, nor conduct their candidacies in improper ways. This service is performed through a committee of fifty representing every type of lawyer. "Recently," he said, "I came across a book by Norman Angell and read: 'Man can never be governed by experts, and he can never govern without them.' Government is a political matter; it is not exactly a science, but it needs its aid. The final power resides with the people, and we have been perhaps over-democratic in leaving to the people certain great powers without providing them with means for information. Our profession owes to the voter the kind of information with regard to candidates for judicial office which we alone can give."